

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

IN RE:)	Chapter 11
)	
EASTERN LIVESTOCK CO., LLC, et al., ¹)	Case No. 10-93904-BHL-11
)	
Debtor.)	Hon. Basil H. Lorch III

MOTION FOR RULE 2004 EXAMINATIONS

James A. Knauer, Chapter 11 Trustee, by counsel, pursuant to Rule 2004(c) of the Federal Rules of Bankruptcy Procedure, respectfully moves the Court for an Order providing for the examinations of eleven (11) current and former employees of Fifth Third Bank, N.A. (the "Deponents") on the following grounds:

I. JURISDICTION

1. This Court has jurisdiction of this proceeding under 28 U.S.C. §1334(a) and 157 (b), and this matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (O). Venue is proper in this district pursuant to 18 U.S.C. §1409(a).

2. The authority for the relief requested herein is Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

II. FACTUAL BACKGROUND

3. Petitioning creditors commenced the above-captioned chapter 11 case ("Chapter 11 Case") against Debtor on December 6, 2010 ("Petition Date") by filing an involuntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. ("Bankruptcy Code"). This Court entered its *Order For Relief In An Involuntary Case And Order To Complete Filing* [Docket #110] on December 28, 2010.

¹ The Debtor entities are Eastern Livestock Co., LLC and Okie Farms, L.L.C.

4. On December 27, 2010, the Court entered its *Order Approving The Appointment Of James A. Knauer As Chapter 11 Trustee* [Docket #102] ("Trustee Order"), approving the United States Trustee's *Notice Of Appointment And Application for Order Approving Appointment of Trustee* [Docket #98] pursuant to 11 U.S.C. § 1104.

5. This Court, by order dated February 1, 2011 [Docket #248], approved the Trustee's retention of Hoover Hull as special counsel to investigate claims against Fifth Third. Such claims may relate to the property and liabilities of the Debtors, may affect the administration of the estate, the source of money or property needed to consummate a plan, and other matters relevant to this case. Accordingly, the Trustee's investigation of claims against Fifth Third falls within the scope of Bankruptcy Rule 2004(b).

6. At a hearing on December 14, 2011, the Court instructed Special Counsel to provide the Court with a preliminary report on its investigation by March 13, 2012.

7. Pursuant to that charge, the undersigned counsel, by letter dated January 10, 2012, requested the availability of the following Fifth Third Bank employees for deposition:

Anne Kelly, Relationship Manager for Eastern Livestock;
Dave Fuller, Vice President, Structured Finance Group Team Lead, initial relationship manager for Eastern Livestock;
Lori Hart, Operations Manager, Structured Finance Group;
Timothy Spurlock, Investigator in the Bank Protection Department;
Sean Kelly, Field Exam Department;
Devon Morse, Investigator;
Sara Chapman;
Amber Whitehouse;
Shannon Hughes;
Patty Voss; and
Darren Steinmann.

A true and accurate copy of Special Counsel's January 10, 2012 letter is attached hereto as

Exhibit A. Special Counsel requested deposition dates during the weeks of January 30, 2012, and February 14, 2012. *See* Ex. A.

8. Notwithstanding repeated calls requesting the witnesses' availability during the week of January 30, Mr. Britt, counsel for Fifth Third stated on January 25, 2012, no witnesses were available the week of January 30.

9. On January 26, 2012, Mr. Britt, in a telephone conversation, stated that the following Fifth Third witnesses are available on the following dates:

Darren Steinmann, February 14, 2012;
Anne Kelly, February 14 or 15, 2012,
David Fuller, February 14 or 15, 2012,
Lori Hart, February 14 or 15, 2012;
Amber Whitehouse, the morning of February 22, 2012;
Timothy Spurlock, February 21 or 22, 2012; and
Shannon Hughes, February 21 or 22, 2012.

Mr. Britt further stated he would confirm the availability of the remaining witnesses and provide those dates by letter.

10. In a call later that day regarding whether Vorys, Sater, Seymour and Pease LLP, (who is also counsel for Fifth Third) would accept service of a subpoena for Wayne Stoffel, Stoffel Consulting Services, Inc. and Agribusiness Consulting Group, LLC, (who conducted field audits of Eastern Livestock in May and October 2010), Messrs. Richardson and Britt, counsel for Fifth Third, raised, for the first time, whether the Trustee would notice the depositions of the Deponents in the bankruptcy case and also in each pending adversary proceeding. Since the Court requested a preliminary report by March 13, the undersigned counsel stated his initial reaction was to only notice the depositions of the Deponents in the bankruptcy case to avoid delaying the depositions.

11. On January 30, 2012, counsel for Fifth Third by e-mail asked the undersigned if the Trustee would notice the depositions in each adversary as well as the bankruptcy case.

12. By letter dated February 1, 2012, the undersigned counsel again asked counsel for Fifth Third Bank to confirm the availability of the Fifth Third Bank employees for deposition. A true and accurate copy of Special Counsel's February 1, 2012 letter is attached hereto as **Exhibit B**.

13. On February 2 and 3, the undersigned counsel left voicemails for Kent Britt and David Hine, counsel for Fifth Third requesting them to call him regarding the depositions. Had counsel for Fifth Third returned the calls from undersigned counsel, they would have learned that the Trustee had agreed to conduct the depositions in both the bankruptcy case and in each adversary proceeding as requested.

14. Fifth Third, without making any attempt to have a discovery conference required by S.D. Ind. L.R. 37.1 (made applicable hereto by S.D. Ind. B-9014), and contrary to the discovery protocols ordered in this case, filed a Motion to Limit Discovery or Alternatively, for Protective Order on February 3, 2012 (the "Discovery Motion"). In the Discovery Motion, Fifth Third seeks a protective order to have the depositions of the Deponents noticed in the bankruptcy case and each adversary proceeding. Fifth Third further seeks to limit the depositions of each witness by all attending counsel to one business day of seven hours, relief which was never informally requested prior to the Discovery Motion.

15. By letter dated February 6, 2012, Trustee counsel notified Fifth Third of its agreement with Fifth Third's request to proceed with noticing the depositions in the bankruptcy and each of the adversary proceedings. A true and accurate copy of Special Counsel's February 6, 2012 letter is attached hereto as **Exhibit C**. The Trustee's counsel further informed Fifth Third it would proceed with the following schedule to depose certain Fifth Third Bank employees in accordance with the bank's proposed schedule:

Darren Steinmann, February 14, 2012;
Anne Kelly, February 14 or 15, 2012,
David Fuller, February 14 or 15, 2012,
Lori Hart, February 14 or 15, 2012;
Amber Whitehouse, the morning of February 22, 2012;
Timothy Spurlock, February 21 or 22, 2012; and
Shannon Hughes, February 21 or 22, 2012.

Id. Undersigned counsel for the Trustee also stated his intention to formally notice the depositions of the remaining Deponents if Fifth Third did not provide convenient dates for their depositions by Wednesday, January 8, 2012. *Id.*

16. On February 7, Fifth Third, by counsel, offered to withdraw its Discovery Motion only if all parties to this bankruptcy proceeding will stipulate that Fifth Third's witnesses will only be subjected to one seven (7) hour deposition of each witness by all counsel. A true and accurate copy of the February 7, 2012 e-mail from counsel for Fifth Third is attached hereto as

Exhibit D. In response, the undersigned counsel replied:

As stated, the Trustee has no objection to the depositions being noticed in the bankruptcy case and the adversary proceedings. However, we cannot agree to a limit of one deposition of seven hours. It is unreasonable to agree in advance to a seven hour time limit that restricts all parties and requires complete coordination among them for the limited time. As special counsel we would go first and make every effort to make the deposition efficient. I am certain that other counsel would agree to make similar representations. But as Dan and others have pointed out, it is premature to agree in the abstract that everyone will be able to complete all of their questions in seven hours. Moreover, we do not have a complete production of documents from Fifth Third. Finally, Fifth Third did not even raise this issue until you after informed us that its employees were unavailable the week of Jan. 31. We need to get these depositions scheduled so that we can complete our investigation.

See Ex. D.

17. In the course of the February 7 call, Eric Richardson and Kent Britt, counsel for Fifth Third stated that Fifth Third will not produce any witnesses until the Court rules on its Discovery Motion. Counsel for Fifth Third refused to identify whether any of the Deponents are

available to be deposed the weeks of February 14, and 20, 2012, notwithstanding their prior representations on January 26, 2012.

III. RELIEF REQUESTED

18. The Trustee requests the Court to enter an Order authorizing the Trustee to take the depositions of Fifth Third's current and former employees as follows:

Darren Steinmann	February 14, 2012
Lori Hart	February 14 or 15, 2012
Anne Kelly	February 14 or 15, 2012
David Fuller	February 16, 2012
Sean Kelly	February 17, 2012
Timothy Spurlock	February 21 or 22, 2012
Shannon Hughes	February 21 or 22, 2012
Amber Whitehouse	February 22, 2012
Devon Morse	February 23 or 24, 2012
Patty Voss	February 24, 2012
Sara Chapman	February 24, 2012

WHEREFORE, the Trustee respectfully requests that the Court enter an Order authorizing the Rule 2004 examinations of the Deponents from day to day until completed and to direct that these depositions take place at the offices of Vorys Sater Seymour and Pease LLP, 221 East Fourth St., Suite 2000, Atrium Two, Cincinnati, OH 45202 on the dates set forth above.

Respectfully submitted,

/s/ John David Hoover
John David Hoover (#7945-49)
jdhooover@hooverhull.com
Sean T. White (#20428-49)
swhite@hooverhull.com
Hoover Hull LLP
111 Monument Circle, Suite 4400
P.O. Box 44989
Indianapolis, IN 46244-0989
Telephone: (317) 822-4400
Facsimile: (317) 822-0234

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2012, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

David L. Abt on behalf of Other Professional David Abt
davidabt@mwt.net

Amelia Martin Adams on behalf of Creditor Alton Darnell dba Darnell Alton Barn
aadams@dlgfir.com

John W Ames on behalf of Creditor Phillip Reed
james@bgdlegal.com, shm@gdm.com, tlm@gdm.com, rtrowbridge@kslaw.com

Jerald I. Ancel on behalf of Creditor Russell DeCordova d/b/a deCordova Cattle Company
jancel@taftlaw.com, ecfclerk@taftlaw.com, krussell@taftlaw.com

Christopher E. Baker on behalf of Creditor Ozarks Regional Stockyard
cbaker@hlawfirm.com, thignight@hklawfirm.com

T. Kent Barber on behalf of Creditor Blue Grass Maysville Stockyards, LLC
kbarber@dlgfir.com, dlgecf@dlgfir.com, dlgecf@gmail.com

Robert A. Bell on behalf of Counter-Defendant Fifth Third Bank
rabel@vorys.com, dmchilelli@vorys.com

C. R. Bowles on behalf of Creditor Joplin Regional Stockyards
cbowles@bgdlegal.com, shm@gdm.com

Steven A. Brehm on behalf of Cross Defendant Superior Livestock Auction, Inc.
sbrehm@bgdlegal.com, bfb@gdm.com

Kent A Britt on behalf of Counter-Defendant Fifth Third Bank
kabritt@vorys.com, cbkappes@vorys.com

Lisa Koch Bryant on behalf of Creditor Peoples Bank & Trust Co. of Pickett County
courtmail@tbhlaw.net

John R.Carr on behalf of Creditor First Bank and Trust Company, The
jrciii@acs-law.com, sfinnerty@acs-law.com

James M. Carr on behalf of Intervenor James Knauer, Trustee
james.carr@faegrebd.com,

Deborah Caruso on behalf of Other Professional Kathryn Pry
dcaruso@daleeke.com, mthomas@daleeke.com

Bret S. Clement on behalf of Creditor First Bank and Trust Company, The
bclement@acs-law.com, sfinnerty@acs-law.com

Jason W. Cottrell on behalf of Creditor Rex Elmore
jwc@stuartlaw.com

Kirk Crutcher on behalf of Counter-Defendant Gene Shipman
kcrutcher@mcs-law.com, jparsons@mcs-law.com, cmarshall@mcs-law.com

Jack S Dawson on behalf of Defendant Jane, LLC
jdawson@millerdollarhide.com, jowens@millerdollarhide.com,
receptionist@millerdollarhide.com

Dustin R. DeNeal on behalf of Intervenor James Knauer, Trustee
dustin.deneal@faegrebd.com, patricia.moffit@faegrebd.com, sarah.herendeen@faegrebd.com

Laura Day DelCotto on behalf of Creditor Alton Darnell dba Darnell Alton Barn
ldelcotto@dlgfir.com, dlgecf@dlgfir.com, dlgecf@gmail.com

David Alan Domina on behalf of Creditor Bellar Feed Lots, Inc.
dad@dominalaw.com, KKW@dominalaw.com, efiling@dominalaw.com

Daniel J. Donnellon on behalf of Creditor First Bank and Trust Company, The
ddonnellon@ficlaw.com, knorwick@ficlaw.com

Trevor L. Earl on behalf of Creditor Your Community Bank
tearl@rwsvlaw.com

Shawna M Eikenberry on behalf of Counter-Claimant James Knauer
shawna.eikenberry@bakerd.com, sarah.herendeen@bakerd.com

Jeffrey R. Erler on behalf of Creditor Russell DeCordova d/b/a deCordova Cattle Company
jeffe@bellnunnally.com

Sarah Stites Fanzini on behalf of Creditor Intrust Bank, NA
sfanzini@hopperblackwell.com, mroth@hopperblackwell.com

Robert H. Foree on behalf of Creditor Kentucky Cattlemen's Association
robertforee@bellsouth.net

Sandra D. Freeburger on behalf of Creditor Estate of John S. Gibson, Anna Gayle Gibson, Execu
sfreeburger@dsf-atty.com, smattingly@dsf-atty.com

Melissa S. Giberson on behalf of Counter-Defendant Fifth Third Bank
msgiberson@vorys.com

Jeffrey J. Graham on behalf of Creditor Russell DeCordova d/b/a deCordova Cattle Company
jgraham@taftlaw.com, ECFClerk@taftlaw.com, krussell@taftlaw.com, aolave@taftlaw.com

Terry E. Hall on behalf of Intervenor James Knauer, Trustee
terry.hall@faegrebd.com, sharon.korn@faegrebd.com, sarah.herendeen@faegrebd.com

John David Hoover on behalf of Trustee James Knauer
jdhooover@hooverhull.com

John Huffaker on behalf of Creditor Friona Industries, LP
john.huffakerr@sprouselaw.com, lynn.acton@sprouselaw.com, rhonda.rogers@sprouselaw.com

Jeffrey L Hunter on behalf of Joined Party United States Department of Agriculture, Grain Ins
jeff.hunter@usdoj.gov, USAINS.ECFBankruptcy@usdoj.gov

Jay Jaffe on behalf of Intervenor James Knauer, Trustee
jay.jaffe@faegrebd.com, tracy.whitman@faegrebd.com, sarah.herendeen@faegrebd.com

Todd J. Johnston on behalf of Counter-Claimant Gabriel Moreno
tjohnston@mcjllp.com

James Bryan Johnston on behalf of Creditor Bynum Ranch Co.
bjtexas59@hotmail.com, bryan@ebs-law.net

Jill Zengler Julian on behalf of Joined Party United States Department of Agriculture, Grain Ins
Jill.Julian@usdoj.gov

Edward M King on behalf of Creditor Fifth Third Bank
tking@fbtlaw.com, dgioffre@fbtlaw.com

James A. Knauer
jak@kgrlaw.com, hns@kgrlaw.com

Erick P Knoblock on behalf of Cross-Claimant Kathryn Pry
eknoblock@daleeke.com

Theodore A Konstantinopoulos on behalf of Creditor General Electric Capital Corporation
ndohbky@jbandr.com

Randall D. LaTour on behalf of Counter-Defendant Fifth Third Bank
RDLatour@vorys.com, khedwards@vorys.com, bjtobin@vorys.com

David A. Laird on behalf of Creditor Peoples Bank of Coldwater Kansas
david.laird@moyewwhite.com, lisa.oliver@moyewwhite.com, deanne.stoneking@moyewwhite.com

David L. LeBas on behalf of Counter-Defendant J&F Oklahoma Holdings, Inc.
dlebas@namanhowell.com, koswald@namanhowell.com

Elliott D. Levin on behalf of Cross Defendant Joplin Regional Stockyards, Inc.
edl@rubin-levin.net, atty_edl@trustesolutions.com

Elliott D. Levin on behalf of Petitioning Creditor Superior Livestock Auction, Inc.
robin@rubin-levin.net, edl@trustesolutions.com, edl@trustesolutions.net

Kim Martin Lewis on behalf of Other Professional Elizabeth Lynch
kim.lewis@dinslaw.com, lisa.geeding@dinslaw.com, patrick.burns@dinslaw.com

James B. Lind on behalf of Counter-Defendant Fifth Third Bank
jblind@vorys.com

Karen L. Lobring on behalf of Creditor Deere & Company
lobring@msn.com

John Hunt Lovell on behalf of Counter-Defendant Cactus Growers, Inc.
john@lovell-law.net, Sabrina@lovell-law.net, Shannon@lovell-law.net, paula@lovell-law.net

Harmony A Mappes on behalf of Counter-Claimant James Knauer
harmony.mappes@faegrebd.com, betsy.smith@faegrebd.com, sarah.herendeen@faegrebd.com

John Frederick Massouh on behalf of Counter-Defendant Friona Industries, L.P.
john.massouh@sprouselaw.com

Michael W. McClain on behalf of Creditor Grant Gibson
mike@kentuckytrial.com, laura@kentuckytrial.com

Kelly Greene McConnell on behalf of Creditor Supreme Cattle Feeders, L.L.C.
lisahughes@givenspursley.com

James Edwin McGhee on behalf of Creditor Vermilion Ranch Corporation
mcghee@derbycitylaw.com, belliott@derbycitylaw.com, patenaude@derbycitylaw.com

William Robert Meyer on behalf of Creditor Republic Bank and Trust Company
rmeyer@stites.com

Christie A. Moore on behalf of Counter-Defendant Superior Livestock Auction, Inc.
cmoore@bgdlegal.com, ljs2@bgdlegal.com

Allen Morris on behalf of Creditor Republic Bank and Trust Company
amorris@stites.com, dgoodman@stites.com

Judy Hamilton Morse on behalf of Creditor Heritage Feeders LP
judy.morse@crowedunlevy.com, ecf@crowedunlevy.com, donna.hinkle@crowedunlevy.com,
karol.brown@crowedunlevy.com

Walter Scott Newbern on behalf of Creditor Arcadia Stockyard
wsnewbern@msn.com

Shiv Ghuman O'Neill on behalf of Plaintiff James Knauer, Trustee
shiv.oneill@faegrebd.com

Matthew J. Ochs on behalf of Creditor Peoples Bank of Coldwater Kansas
kim.maynes@moyewhite.com

Michael Wayne Oyler on behalf of Creditor Your Community Bank
moyler@rwsvlaw.com

Ross A. Plourde on behalf of Creditor Crumpler Bros.
ross.plourde@mcafeetaft.com, erin.clogston@mcafeetaft.com

Wendy W Ponader on behalf of Trustee James Knauer
wendy.ponader@faegrebd.com, sarah.herendeen@faegrebd.com

Timothy T. Pridmore on behalf of Counter-Claimant Gabriel Moreno
tpridmore@mcjllp.com, lskibell@mcjllp.com

Anthony G. Raluy on behalf of Creditor Peoples Bank & trust Co. of Pickett County
traluy@fbhlaw.net

Jeffrey E. Ramsey on behalf of Creditor Intrust Bank, NA
jramsey@hopperblackwell.com, mhaught@hopperblackwell.com

Eric C Redman on behalf of Defendant Bankfirst Financial Services
ksmith@redmanludwig.com, kzwickel@redmanludwig.com

Joe T. Roberts on behalf of Counter-Claimant Laurel Livestock Market, INC.
jratty@windstream.net

Susan K. Roberts on behalf of Creditor Rex Elmore
skr@stuartlaw.com, lbt@stuartlaw.com

Mark A. Robinson on behalf of Creditor Cactus Growers, Inc.
mrobinson@vhrlaw.com, dalbers@vhrlaw.com

John M. Rogers on behalf of Creditor Joplin Regional Stockyards
johnr@rubin-levin.net, susan@rubin-levin.net

Joseph H Rogers on behalf of Defendant Nichols Livestock
jrogers@millerdollarhide.com, cdow@millerdollarhide.com

Jeremy S Rogers on behalf of Other Professional Elizabeth Lynch
Jeremy.Rogers@dinslaw.com, joyce.jenkins@dinslaw.com

James E Rossow on behalf of Counter-Defendant Superior Livestock Auction, Inc.
jim@rubin-levin.net, susan@rubin-levin.net, ATTY_JER@trustesolutions.com

Thomas C Scherer on behalf of Creditor Cullman Stockyard, Inc.
tscherer@binghammchale.com, mmcclain@binghammchale.com

Ivana B. Shallcross on behalf of Creditor Joplin Regional Stockyards
ishallcross@bgdlegal.com

William E Smith on behalf of Creditor Coffeyville Livestock Market, LLC
wsmith@k-glaw.com, pballard@k-glaw.com

James E. Smith on behalf of Cross Defendant Diamond B Ranches
jsmith@smithakins.com, legalassistant@smithakins.com

Robert K Stanley on behalf of Defendant Eastern Livestock Co., LLC
robert.stanley@faegrebd.com

Joshua N. Stine on behalf of Counter-Defendant Fifth Third Bank
kabritt@vorys.com

Andrew D Stosberg on behalf of Defendant Willie Downs
astosberg@lloydmc.com, bmarks@lloydmc.com

Meredith R. Thomas on behalf of Other Professional Kathryn Pry
mthomas@daleeke.com

John M. Thompson on behalf of Creditor Heritage Feeders LP
john.thompson@crowedunlevy.com, jody.moore@crowedunlevy.com,
donna.hinkle@crowedunlevy.com

Kevin M. Toner on behalf of Counter-Claimant James Knauer
kevin.toner@faegrebd.com, crystal.hansen@faegrebd.com, judy.ferber@faegrebd.com

U.S. Trustee
Ustpreion10.in.ecf@usdoj.gov

Andrea L Wasson on behalf of Creditor Lytle Street Development
andreawassonatty@gmail.com

Stephen A. Weigand on behalf of Creditor First Bank and Trust Company, The
sweigand@ficlaw.com

Charles R. Wharton on behalf of U.S. Trustee U.S. Trustee
Charles.R.Wharton@usdoj.gov, Charles.R.Wharton@usdoj.gov

Jessica E. Yates on behalf of Creditor CPC Livestock, LLC
jyates@swlaw.com, jmilelli@swlaw.com, docket_den@swlaw.com

James T Young on behalf of Creditor Michael Walro
james@rubin-levin.net, ATTY_JTY@trustesolutions.com, lemerson@rubin-levin.net,
Carmen@rubin-levin.net

/s/ John David Hoover

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